

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 19, 2006

REGINOL L. WATERS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2000-C-1267 Steve Dozier, Judge

No. M2005-02009-CCA-R3-PC - Filed May 22, 2006

The petitioner, Reginol L. Waters, appeals the Davidson County Criminal Court's dismissal of his petition for post-conviction relief from his convictions for two counts of aggravated rape, one count of aggravated robbery, and one count of aggravated burglary and resulting effective sentence of fifty-eight years in the Department of Correction. On appeal, the petitioner claims he received the ineffective assistance of counsel based upon his trial attorney's failure (1) to consult with him adequately, (2) to investigate the facts of his case adequately, (3) to prepare his testimony adequately, and (4) to file a pre-trial motion to suppress properly. We affirm the trial court's dismissal of the petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Nathan Scott Moore, Nashville, Tennessee, for the appellant, Reginol L. Waters.

Paul G. Summers, Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; and Brian Keith Holmgren, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This court summarized the facts underlying the petitioner's convictions in affirming the judgments of the trial court on direct appeal.

The victim . . . , a college student, testified that on April 24, 2000, at approximately midnight, she heard someone outside her apartment. She thought it was her neighbor and walked outside. Instead, she saw the [petitioner] standing outside of a storage closet; she re-entered her apartment. Later, she looked outside and saw the [petitioner] sitting

inside a green pickup truck parked in the parking lot of her apartment complex. [The victim] stated she and the [petitioner] made eye contact, and she saw his face.

[The victim] testified that approximately two hours later, she heard a noise while she was in her living room watching a movie. She looked up and saw the [petitioner] running down the hallway of her apartment toward her. [The victim] described him as a large black man with light freckles, wearing white clothing and a cloth across the bottom half of his face. The [petitioner] was holding a knife with a serrated edge and flecks of white drywall or paint on it.

[The victim] stated the [petitioner] threatened to hurt her if she screamed, stuffed a sock into her mouth, and wrapped masking tape around her head while pointing the knife at her throat. [The victim] pulled the sock out of her mouth and begged the [petitioner] not to hurt her. [The victim] stated the [petitioner's] cloth fell below his nose, and she saw his entire face above his mouth. The [petitioner] demanded [the victim] give him all of her money, and when [the victim] went to get her purse, she ran for the door. The [petitioner] re-captured her and again demanded money.

When [the victim] did not find any money in her wallet, she gave the [petitioner] her debit card. [The victim] also wrote down her PIN number on a notice from her pet's veterinarian and gave it to the [petitioner]. She pled with the [petitioner] not to kill her. The [petitioner] pulled the cloth down from his face, and she again saw his face before he pulled the cloth back over his nose.

[The victim] pulled away from the [petitioner], ran into the bathroom, and leaned over the toilet. [The victim] testified that she pretended to vomit because she thought the [petitioner] would leave her alone. Instead, the [petitioner] came into the bathroom and forced [the victim] down on her knees. He held a knife to her face and threatened to kill her if she did not perform oral sex on him. As [the victim] was performing oral sex on the [petitioner], she bit him and ran toward the door. [The victim] managed to unlock one of the locks on the door before the [petitioner] seized her. [The victim] testified the [petitioner] then grabbed the masking tape that was still around her neck, twisted it, and pulled it up until she could not breathe. The [petitioner] repeatedly asked her why she had bitten him and struck her across her temple. [The victim] stated she again attempted to

escape, but the [petitioner] twisted the masking tape tighter until she was choking.

The [petitioner] then pushed [the victim] on her back and straddled her. He placed his legs on [the victim's] shoulders and again forced her to perform oral sex on him. As he held a knife to her neck, the [petitioner] threatened to kill her if she did not swallow, and he ejaculated into her mouth. She estimated that "maybe . . . five minutes" passed between the two fellatio incidents, but that "it felt like it was forever."

The [petitioner] then demanded [the victim] tell him how to use the debit card. [The victim] testified the [petitioner] pulled the cloth beneath his mouth, and she again saw his face before he pulled it over his nose. [The victim] attempted to escape, but the [petitioner] pulled both of her arms behind her and again stuffed a sock into her mouth. The [petitioner] tied [the victim's] hands behind her back with a scarf, tied the sock into her mouth with a pair of hose, and tied her ankles with her purse strap.

As [the victim] was tied up on the floor, the [petitioner] looked around her apartment and grabbed her walkman. The [petitioner] threatened to kill [the victim], her family, and her friends if she called the police. He also threatened to come back and kill her if there was no money in her bank account; he then left. [The victim] testified the [petitioner] was in her apartment for approximately twenty to twenty-five minutes. [The victim] called the police within a few minutes after the [petitioner] left.

Sergeant Edwin Allen Groves testified that based upon [the victim's] description of her attacker, he apprehended the [petitioner], who was sitting in a green pickup truck parked in front of a SunTrust Bank. Officer James Pearce testified a "showup" was conducted at the scene where the [petitioner] was apprehended, and [the victim] identified the [petitioner] as her attacker. Officer Scott Cothran stated he searched the [petitioner's] vehicle at the scene and found [the victim's] debit card, the knife, and the cloth the [petitioner] wore on his face. Detective Keith Sutherland stated he later searched the vehicle and found the piece of paper on which [the victim] wrote her PIN number. Detective Sutherland and Officer Gene Martin testified they interviewed the [petitioner], who eventually confessed to committing the offenses.

State v. Reginol L. Waters, No. M2001-02682-CCA-R3-CD, Davidson County, slip op. at 2-3 (Tenn. Crim. App. Jan. 30, 2003).

On May 17, 2004, the petitioner filed a petition for post-conviction relief alleging numerous constitutional violations. The trial court appointed counsel, and the petitioner filed an amended petition for post-conviction relief alleging that he received the ineffective assistance of counsel, that the trial court improperly sentenced him in violation of the Double Jeopardy Clause of the federal constitution, and that the trial court erred in not ordering a psychological examination before the trial.

At the post-conviction hearing, Metropolitan Police Department Officer James K. Pierce testified that he investigated the petitioner's case. He said he was one of the first officers to respond to the victim's call for help. He said the victim gave him a description of her assailant which he broadcast over the police radio. He said that within one hour of the assault, the police apprehended the petitioner while he was using the victim's bank card. Officer Pierce testified that he transported the victim to a "show up" identification after the petitioner was arrested.

The petitioner's attorney testified that his relationship with the petitioner was strained. He said that after the trial, the petitioner submitted letters of complaint to the Tennessee Board of Professional Responsibility. He said the petitioner also filed a federal lawsuit against him. He said the petitioner had tried unsuccessfully to have him replaced before the trial. The petitioner's attorney said that the petitioner was

able to understand what I was saying and understand my counsel. However, he was extremely angry. He was upset about the process of his case and the prognosis of it. So he was not very accepting of my counsel. So . . . he was not well accepting of the advice that I was giving, nor was he pleased with what he deemed to be the prospects for his trial.

The petitioner's attorney said that although the petitioner asked him to provide the petitioner a mental examination, he saw no basis for doing so. He said the petitioner had no history of mental instability. He said he did not seek to have a mental examination performed on the petitioner.

The petitioner's attorney testified that he discussed the petitioner's testimony with him at length before the petitioner testified. He said he believed the petitioner understood the advice he gave him concerning his testimony.

The petitioner's attorney testified that he decided to file a motion to suppress the petitioner's confession before he had received complete discovery. The attorney said, however, that he could not remember what about the discovery was incomplete. The attorney said that in any event, he had the necessary discovery he needed for the motion to suppress hearing.

On cross-examination, the petitioner's attorney admitted that the petitioner testified in a narrative fashion based upon the petitioner's changing his story before the trial. The attorney said he was ethically precluded from asking the petitioner questions regarding the petitioner's alibi defense. He said he had not filed the required alibi notification to the prosecution because the petitioner had not provided an alibi to him before the trial. He said he did not fail to pursue any valid defenses because of the strained relationship he had with the petitioner.

Metropolitan Police Department Detective Keith Sutherland testified that he interviewed the petitioner. Det. Sutherland said he tape-recorded only part of the interview because the petitioner asked him to stop recording. He said the petitioner confessed after the recording had ceased. Det. Sutherland said he could not recall whether the petitioner had asked for an attorney. On cross-examination, Det. Sutherland said he did not testify untruthfully at the petitioner's trial.

The petitioner testified that his relationship with his attorney was strained because the attorney "diminished a lot of issues" put forth by the petitioner. He said his attorney was not responsive to his concerns. He said that he provided his attorney with legal research but that his attorney did not review the cases he provided to him. He said that he asked his attorney to file an appeal on a bond issue but that his attorney would not do so, electing instead to draft a pro se appeal for the petitioner to sign. The petitioner said his attorney's actions made him feel "like that was deceitful in misrepresentation."

The petitioner testified that his attorney only spoke to him five or six times before the trial. The petitioner said they "never really got into the trial, what it was going to be like. [The attorney] mostly got into how and who [the judge] was, what was the D.A., but we really didn't get into the situation of what was the trial."

The petitioner testified that his attorney did not meet with him before the suppression hearing. He said the attorney failed to investigate his case properly. He said Det. Sutherland testified at the trial that the petitioner did not request an attorney. The petitioner said, however, that he did request an attorney. He said his attorney's failure to discover this discrepancy prejudiced his defense.

The petitioner testified that on the police radio transmission tape, which he said he had never had the opportunity to listen to before the trial, Officer Pierce described the perpetrator as a black male wearing white clothes but that at the trial, Officer Pierce described the perpetrator as a light-skinned black male. He said that had his attorney properly investigated his case, he would have been able to discredit Officer Pierce's testimony and the victim's subsequent identification of him.

After listening to the arguments of counsel, the trial court issued an order dismissing the petitioner's petition for post-conviction relief. The trial court stated:

The petitioner first argues that trial counsel was ineffective by failing to investigate the possibility of another suspect in the case.

[The petitioner's attorney] testified that the petitioner told him that he had pawned his pickup truck that night to someone known a[s] "Big Fred". However, the petitioner provided no information that could have led [his attorney] to finding this individual so that he could attempt to interview him. Trial counsel can not be faulted for failure to present a witness that can not be located because no information has been provided to locate them. The petitioner's credibility with this Court is minuscule and the fact that this witness could not be located lends credence to his non-existence. Thus, the petitioner has not carried his burden on this issue. . . .

The petitioner next argues that trial counsel failed to adequately inform the petitioner of the nature of the trial process and his potential exposure if convicted. Along those same lines, the petitioner also claims that [his attorney] did not adequately investigate the case or case law provided to [the attorney]. [The attorney] testified that he met with the petitioner numerous times prior to trial and they had thoroughly gone over the evidence in the case and formulated possible defenses. . . . [The attorney] testified that he discussed testifying with the petitioner and felt the petitioner understood what he had been advised of. . . . The court accredits the testimony of [the attorney] on these claims and therefore finds these issues are without merit.

The petitioner next argues that trial counsel failed to present proof at the suppression hearing that resulted in his statements being admitted into evidence. Specifically, the petitioner alleges that trial counsel was ineffective for failing to present his request for counsel at 6:40 A.M. on the night of the arrest. This issue was not brought up in the written or oral motion to suppress. Although the Court of Criminal Appeals determined that this issue was waived for appellate purposes, they held that even if admission of his statements was error, it would have been harmless error in light of the overwhelming evidence against him. . . . Therefore, the Court is of the opinion that this issue is without merit, and in addition, has been previously determined by the appellate court.

The petitioner next argues that trial counsel failed to recognize and raise the issue that Officer Pierce allegedly gave perjured testimony at trial. The testimony in question revolves around the "Be on the Look Out" description given by law enforcement in this case. Specifically, the petitioner claims Officer Pierce testified in court that he thought the description that went out was the suspect was a "light

skinned male black”. However, the actual dispatch recording of the call only says “male black”. Although there appears to be an inconsistency, the petitioner has failed to present any proof as to how this rendered the result in this case unreliable. Officer Pierce testified that he thought the description given was a “light skinned male black”, but he could be mistaken. Officer Pierce testified at the post-conviction hearing that he did not give perjured testimony at trial. The Court accredits the testimony of Officer Pierce. More importantly, the 911 tape was introduced documenting the description given by the victim. Therefore, the jury did hear the actual description and Officer Pierce’s testimony. . . .

INEFFECTIVE ASSISTANCE OF COUNSEL

The petitioner contends he received the ineffective assistance of counsel. He claims his attorney’s performance was constitutionally deficient (1) for failing to consult with him about his case before the trial, (2) for failing to investigate adequately, (3) for failing to prepare him to testify, and (4) for prematurely filing a motion to suppress. The state contends the petitioner’s attorney’s performance was not deficient. It claims the petitioner has failed to demonstrate either that his attorney’s performance was constitutionally deficient or that he was prejudiced. We agree with the state.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court’s findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court’s conclusions as to whether counsel’s performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel’s performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel’s performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, “the result of the proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel’s

representation fell below an objective standard of reasonableness or “outside the wide range of professionally competent assistance.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The prejudice prong requires a petitioner to demonstrate that “there is a reasonable probability that, but for counsel’s professional errors, the result of the proceeding would have been different.” Id. at 694, 104 S. Ct. at 2068. “A reasonable probability means a probability sufficient to undermine confidence in the outcome.” Id. Failure to satisfy either prong results in the denial of relief. Id. at 697, 104 S. Ct. at 2069.

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel’s conduct, a “fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. See DeCoster, 487 F.2d at 1201.

I. FAILURE TO COMMUNICATE

The petitioner contends his attorney’s performance was constitutionally deficient for failing to consult with him adequately before the trial. He argues that the animosity between himself and his attorney made his attorney’s performance ineffective, thereby resulting in prejudice. The state contends the petitioner’s attorney did not render ineffective assistance of counsel.

At the post-conviction hearing, the attorney testified that he met with the petitioner to discuss the status of the case on numerous occasions. The trial court accredited the testimony of the petitioner’s attorney and discredited the petitioner’s testimony, finding the petitioner’s credibility to be “minuscule.” We conclude that the record does not preponderate against the trial court’s finding and that the petitioner is not entitled to relief on this issue.

II. FAILURE TO INVESTIGATE

The petitioner contends his attorney’s performance was constitutionally deficient for failing to investigate his case properly. He claims “minimal effort was made by trial counsel to find the alleged perpetrator of the crime for which Appellant was convicted.” The state contends the petitioner’s attorney did not render ineffective assistance of counsel.

The trial court found that the petitioner failed to inform his attorney of the location or identity of the alleged perpetrator. We conclude the record does not preponderate against the trial court’s

finding that the petitioner's attorney's performance was not constitutionally deficient. The petitioner is not entitled to relief on this issue.

III. FAILURE TO PREPARE THE PETITIONER FOR TESTIFYING

The petitioner contends his attorney's performance was constitutionally deficient for failing to prepare him to testify. He argues his attorney's failure to do so prejudiced his defense. The state contends the petitioner's attorney did not render ineffective assistance of counsel.

The petitioner's attorney testified that he could not prepare the petitioner to testify because he learned the petitioner was intending on asserting an alibi defense. He said that because he knew the petitioner's alibi defense was untruthful, he was constrained by the Rules of Professional Responsibility from asking the petitioner questions. He said the petitioner testified by way of narrative. The trial court specifically accredited the testimony of the attorney. We conclude that the petitioner's attorney's performance was not deficient and that in any event, the petitioner has failed to show prejudice. The petitioner is not entitled to relief on this issue.

IV. PREMATURE FILING OF THE MOTION TO SUPPRESS

The petitioner contends his attorney's performance was constitutionally deficient for prematurely filing a motion to suppress his confession before obtaining all the discovery in the case. He claims the attorney filed the motion to suppress the statement three days before obtaining the audiotape of the statement in question. He argues this prejudiced his motion to suppress hearing. The state contends the petitioner's attorney did not render ineffective assistance of counsel.

The petitioner has failed to specify, either at the post-conviction hearing or in his brief to this court, exactly how his attorney's purported premature filing prejudiced his defense. We conclude that the petitioner has failed to carry his burden of proving prejudice by clear and convincing evidence and that he is not entitled to relief on this issue.

CONCLUSION

Based upon the foregoing and the record as a whole, we affirm the trial court's dismissal of the petition.

JOSEPH M. TIPTON, JUDGE